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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 830

JEWEL C. WOODS, PETITIONER
v.
UNITED STATES OF AMERICA

MARCELLUS L. WINSTON, PETITIONER
v.
UNITED STATES OF AMERICA

BARBARA L. TOWLES, PETITIONER
v.
UNITED STATES OF AMERICA

OLIVER G. HOLSEY, PETITIONER
v.
UNITED STATES OF AMERICA

BOSSY GLOVER, PETITIONER
v.
UNITED STATES OF AMERICA

JAMES S. DAVIS, PETITIONER
v.
UNITED STATES OF AMERICA

GEORGE BELL, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals (R. 2-18) are reported at 240 F. 2d 37. The

opinion of the District Court denying the motion to suppress is reported at 126 F. Supp. 612.

JURISDICTION

The judgment of the Court of Appeals was rendered on December 31, 1956 (R. 19-20), and a petition for rehearing *en banc* was denied on February 8, 1957, two judges dissenting (R. 21). The petition for a writ of certiorari was filed on March 11, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether lack of response by occupants to a knock on the door by officers executing a valid search warrant justified their entrance by pushing the door open.

2. Whether on a finding that the entry into one of five places was illegal, and that the evidence obtained thereby should be suppressed, the Court of Appeals was justified in reversing the conviction only as to the defendant arrested at the place of the illegal entry.

3. Whether there was sufficient probable cause for the issuance of a search warrant.

STATUTE INVOLVED

18 U.S.C. 3109 provides:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

STATEMENT

A thirty-one count indictment charged petitioners, and eleven codefendants, with a conspiracy to violate, and substantive violations of, the District of Columbia lottery laws, 22 D.C. Code 1501, 1502 and 1505 (Tr. 2158-2159).[1] Following a jury trial, petitioners were convicted under various counts of the indictment. All of the petitioners, and one Shay, were convicted under count 2 which charged them, and the other codefendants, with the operation of a lottery (Tr. 2164-2165, 2219, 2221-2222, 2224, 2226-2229).[2]

Petitioners and the codefendants unsuccessfully filed pre-trial motions to suppress certain evidence allegedly resulting from unreasonable searches and seizures on premises located at 1620 O Street, N.W., 54 M Street, N.W., 41 L Street, N.W., and 1304 Gallaudet Street, N.E., Washington, D. C., principally upon the grounds that the search warrants covering these premises were

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[1] The designation "Tr." refers to the stenographic transcript of the trial proceedings.

[2] They were sentenced to the following terms of imprisonment to run concurrently, except as stated:

George Bell—eight months to three years on each of counts one and two, and eight months on count twenty-six (Tr. 2219);

James Davis—eight months to three years on each of counts one and two, and eight months on count twenty-two (Tr. 2221);

Bossy Glover—six to eighteen months on each of counts one through ten, six months on each of counts twenty-four and twenty-nine, to run concurrently with each other, but to run consecutively with the sentences imposed on counts one through ten (Tr. 2222);

Oliver Holsey—seven to twenty-one months on each of counts two, twelve through sixteen, twenty-five and thirty (Tr. 2224);

Barbara L. Towles—six to eighteen months on each of counts one and two, and six months on each of counts twenty-two and twenty-seven (Tr. 2227);

Marcellus Winston—Ten to thirty months on count two, and one year on count twenty-two (Tr. 2228);

Jewel C. Woods—five to fifteen months on each of counts two and twenty-two (Tr. 2229).

executed illegally, and were not based on adequate probable cause. (Tr. 2176-2180).[3]

The evidence at the trial consisted for the most part of the reiteration by the officers of the observations on the basis of which the search warrants were obtained, and the evidence obtained by the warrants.

1. The affidavits on which the warrants were obtained recited in detail the observations of police officers over a two month period of various activities of the defendants which began with a surveillance of the activities of petitioner Glover, who, the officers had been informed, was writing and picking up numbers (Tr. 2264-2273). Glover was observed regularly leaving his home at 41 L Street, N.W., about 1:30 P.M., making a few short stops, including 54 M Street, N.W., and returning therefrom with his pockets noticeably bulging. About 2:30 P.M. he would contact petitioner James Davis, a known numbers pickup man, and give him a large brown paper bag. Davis would go to the premises at 1628 O Street, N.W. A number of other defendants, including petitioners Towles, Winston, and Woods, some known to be numbers operators, were seen entering the O Street premises, carrying either brown paper bags or a box or large pocketbooks. When they left the premises they were without the paper bags.

About 2:45 P.M. Glover would go to 1014 Euclid

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[3] The record and transcript do not show that any motion as such was filed challenging the legality of the search, also involved here, of premises located at 2126 10th Street, N. W., but the courts below treated the motions as covering the evidence seized at the 10th Street premise (R. 7, fn. 5). Defendants Owens and Wright who did not appeal, and who were arrested without a warrant at the time of the execution of the search warrant covering the 10th Street premise, unsuccessfully moved to quash their arrest and to suppress evidence seized pursuant thereto (see Tr. 2200-2201).

Street or 2126 10th Street, N.W.—usually the latter premises—which, the officers were reliably informed, were used as a numbers drop and counting house for the money received from number bets. The police also observed that usually about 3:00 P.M., or shortly thereafter, sometimes while Glover was still on the premises, defendants Shay and other unidentified persons entered the 10th Street premises either with bulging pockets or brown paper bags. When they left the premises they did not have the brown paper bags, and their pockets no longer bulged.

During the mornings or early afternoons of January 18, 19, 20, 21, 23, 26, 27, 29, and 30, and in the evening of February 1, 1954, officer Robinson purchased numbers plays from defendants Parker and Rosa Holsey, and petitioner Oliver Holsey at 54 M Street, N.W., janitor's quarters, usually paying 50 cents for the plays. On February 1 the numbers were played for February 2 and 3. These bets were recorded in a regular numbers book and the officer was usually given a duplicate slip bearing the code number 54.

The affidavit recited as follows (Tr. 2273):

> It is the belief of the officers that on all occasions where brown paper bags, pocketbooks, bulging coat pockets, pants pockets, and cardboard boxes are mentioned, that they contain number slips or other numbers paraphernalia. It is also firmly believed that there is now being secreted on premises 1628 O St., N.W., first floor; 2126 10th St., N.W.; 54 M St., N.W., janitor's quarters; 41 L St., N.W.; and 1304 Gallaudet St., N.E., Apt. 201, certain lottery tickets, books, papers, memorandums, or other devices commonly used in the opera-

tion of a policy lottery, and that all the aforementioned persons and automobiles are also engaged in the operation of a lottery in violation of the lottery laws of the District of Columbia. In addition, it is believed that at 41 L St., N.W., there is kept control and accounting records of the operation being conducted by Bossy Glover; and at 1304 Gallaudet St., N.E., Apt. 201, there is kept control and accounting records of the operations being conducted by George Bell.

2. On February 3, 1954, the five search warrants were simultaneously executed at about 4:00 p.m. (Tr. 872-873, 992, 1366-1368, 1670, 1762-1763, 1808-1809). At the O Street premises the officers knocked on the door twice and listened to it. They heard a radio playing inside. One of the officers then called out "Police, we have a search warrant." When no answer was received, one of them upon instruction broke the door down (Tr. 994). As the officers entered the front room, they saw no one, but heard persons running to the back of the apartment and found in the back rooms defendants Burnie King, Curtis, Gross, and Johnson, and petitioners Woods, Towles, Davis, and Winston for whom they had warrants of arrest (Tr. 993-996, 1004-1005, 1006). They served the search warrant on defendant King (Tr. 1096). As soon as the officers entered the apartment, it was clear that a large-scale numbers counting house was in operation. Numbers slips, of which 15,000 were seized, were in the process of being counted to determine "the amount of money owed the counting house by the individual writers or pick-up men. It hadn't been processed for hits." Some of the number slips had been

sorted and fastened into bundles with clips and rubber bands, and placed in bags. A large quantity of slips were spread out or were in baskets on six card tables, each of which was equipped with an adding machine whose tape indicated recent use, and a blanket to deaden the sound. One pile of slips bore the quotation "keep-ins", indicating plays paid in advance, and others bore the quotation "lead overlook", indicating winning numbers which had been overlooked. Burnt number slips were found in the furnace in the backroom (Tr. 1217). Numerous run-down tapes were found. These tapes, which are usually returned to the writers with the "hit" money, contained code symbols relating to individuals and pay-off notations, and indicated the total amount of plays, the net amount owed the backer, and the amount won. On some of the slips and tapes appeared the symbols "54", "B", or "B-40", the same symbols as those on the receipts given to officers on plays purchased by them from petitioners Holsey (see *supra*, p. 5) and Glover (see *infra*, p. 8, fn. 4). The Symbol "K" also appeared on a large number of the slips. The apartment also contained notebooks which contained records of the "hit" numbers for several days and the amount of payments for the "hit" numbers to various code symbols, coin envelopes, clips, rubber bands, staplers, and numbering machines which also facilitate the operation of a counting house (Tr. 996-998, 1004, 1005-1011, 1020-1021, 1033-1052, 1058-1070, 1128, 1195-1198, 1206-1210, 1215-1217, 1220, 1222, 1230, 1245-1247, 1248-1249, 1256-1263, 1897-1899).

The number slips seized from the premises represented a play of $8,896.14 for February 1 (Tr. 1206), $8,450.75 for February 2 (Tr. 1261), and $7,969.73 for

February 3 (Tr. 1261-1262). The code symbols on them represented about 285 different number writers (Tr. 1263). One of the slips covered number 634 which was the winning number of February 1, 1954 (Tr. 1087-1089). Included in the slips seized were those reflecting some of officer Robinson's plays in February 1954 (Tr. 1252-1254, 1255-1256).[4]

At the questioning of the persons arrested at the O Street premises, petitioner Davis stated that he was in the numbers business (Tr. 1578-1579).

A search of the arrested persons revealed numbers slips and a key to the O Street premises on defendant Burnie King (Tr. 1230-1232, 1233); a key to the O Street premises and run-down tape bearing numbers play on petitioner Davis (Tr. 1236-1237); numbers slips and a run-down tape on petitioner Woods (Tr. 1238); a small pad bearing numbers play on defendant Johnson (Tr. 1339); slips of paper bearing plays on defendant Gross (Tr 1240); lottery slips and telephone and rent receipts made out to one Lewis covering the O Street premises, on petitioner Towles[5] (Tr. 1240-1241, 1244); and a small paper bag which con-

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[4] On February 3, 1954, about 12:30 p. m., officer Robinson made number plays with petitioner Oliver Holsey at 54 M Street, N. W., and paid for them with 4 one-dollar bills whose serial numbers were recorded. He received a receipt for them, with the code symbol 54 on it (Tr. 755-756). On eight days between December 12 and 29, 1953, officer Stewart purchased numbers plays from petitioner Glover, for which the officer received 49 numbers slips receipts, some bearing the symbol "B-40" or "B". Some of the numbers won and the officer received his winnings from petitioner Glover (Tr. 792-794, 796-803, 806-827).

[5] Other evidence as to Towles' occupancy of the O Street premises was also adduced (Tr. 1056-1058, 1240-1244, 1845-1847, 1851, 1890).

tained run-down tapes with various codes and a numbers cut-card [6] on defendant Curtis (Tr. 1247).

The officers executing the search warrant covering the premises located at 2126 10th Street knocked at the front door two or three times. They heard no noise within and received no response. One of the officers upon instructions to break open the door, "pushed the door open with his hand, the back of his hand, and the door flew open" (Tr. 1369). In the dining room they found defendants Shay, Larkin King, Wright, and Owens whom they arrested. A search of the premises revealed an adding machine, several numbers slips, rolls of adding machine tape, boxes of coin envelopes, rubber bands, paper clips, two tapes which showed the total mutuels on the first three races that day and a computation from them of the winning number, a racing sheet, and a paper bag which contained $786.13 and an adding machine tape totalling the money in the bag. Defendant Larkin King claimed ownership of the $786 (Tr. 1583). Three dollars of the $786 was part of the four dollars which officer Robinson paid petitioner Holsey for the numbers play that day (Tr. 1370-1372, 1481-1486, 1490-1491, 1510-1511, 1513-1514, 1515, 1516-1518, 1583, 1585, 1649-1653, 2275).

At the premises located at 54 M Street, basement apartment, the officers executing the warrant found the door open with petitioner Holsey in the front room. They advised Holsey that they were police officers and had a search warrant covering the premises (Tr. 1670-1671). In searching the premises, the

[6] A cut-card is one that lists numbers on which less than full odds (600 to 1) are paid.

officers found and seized numbers slips, envelopes with numbers plays written on them, and numbers books with different serial numbers and with the code symbol "54" on some. One of the books contained the slip reflecting officer Robinson's play purchase of the day from petitioner Oliver Holsey. The officers also found defendant Parker on the premises (Tr. 1672, 1722-1723, 1731-1733, 1759). After arresting Holsey, the officers found in his wallet the fourth dollar bill which was used in the purchase by officer Robinson of the numbers play that day from Holsey, a paper with numbers play on it, numbers slips and numbers book bearing the code symbol "54" (Tr. 1672-1673, 1720-1721).

In executing the warrant covering 41 L Street, N.W., Glover's residence, the officers knocked on the door and it was opened by Mrs. Glover. She admitted the officers to the premises, and they advised her that they had a search warrant (Tr. 1762-1763). Petitioner Glover came home immediately thereafter. He was advised of the search warrant, and also arrested under an outsanding warrant (Tr. 1764).

The search of Glover's residence revealed numbers books, numbers slips, cut-cards, run-down tapes, paper bags with number plays on them, and notebooks, on some of which the code symbol "B-40" appeared (Tr. 1770-1783, 1791).

A search of Glover revealed a notebook which contained code numbers and other figures, and a numbers book bearing the code symbol "B-40" (Tr. 1765, 1767-1768). He told the officers that he was in the numbers business and sold between $40 and $45 of numbers slips per day. In petitioner Davis' presence, he

said that he turned his numbers "work" to Davis and his numbers money to defendant James Shay at 2126 10th Street (Tr. 1543, 1559, 1561-1566).

In executing the search warrant covering the premises located at 1304 Gallaudet Street, N.E., the officers were met at the door by petitioner Bell's wife, Mary. After showing her the warrant, they searched the premises and found an adding machine, a metal box which contained two numbers books, one with the symbol "K" on them, money, numbers slips and run-down tapes, cut cards and a notebook record of numbers and amounts, a carton of coin envelopes, a bag of coin wrappers, another numbers book, and such items as pencils, clips, and rubber bands. The number slips in the metal box were totalled on the run-down tapes, and the amount of money in the box corresponded to the totals on the tapes (Tr. 1809, 1833-1835). Petitioner Bell said that he had been writing numbers for about a month and that his daily book amounted from $30 to $35 a day (Tr. 1124-1126).

3. On appeal, the majority and dissenting opinions of the court below (R. 2-18) held that since the officers in executing the warrant at 2126 10th Street, N.W. pushed the door open without first stating their identity and purpose, when no response was received to their knocks, they acted in violation of 18 U.S.C. 3109, and the evidence seized therefrom was inadmissible as the result of an unlawful entry. The majority further held that the inadmissible evidence was prejudicial to defendant Shay because he was arrested there, but that it was not prejudicial to petitioners because the material seized therein was "insignificant compared with the masses of material seized at" the

four other premises (R. 4-7). The dissent felt that in the light of the interrelationship of the five premises raided, and the police officers' observations of some of the petitioners' use of the 10th Street premises, the petitioners might have been prejudiced by the admissibility of the evidence seized at the 10th Street premises.

ARGUMENT

1. We think that the decision below was unduly favorable to petitioners in holding that the entry into the 10th Street premises was invalid. The provision in Section 3109 for announcement of the officers' purpose was designed to require that information be given to someone, not to empty air. Blank silence, either because the occupant fails to respond to the knock, or because he has absented himself from the premises, is tantamount to a refusal to admit any caller, regardless of his errand or authority, and justifies a breaking of the door by officers holding a valid search warrant. See *United States* v. *Camarota,* 278 Fed. 388 (S.D. Calif.), interpreting this statute to avoid the result reached by the court below. See also *Barrientes* v. *United States,* 235 F. 2d 116 (C.A. 5), certiorari denied, 352 U.S. 879, and Rule 41(d), F.R. Crim. P., which contemplates the execution of a search warrant in the absence of the occupant. Furthermore, here, the officers merely pushed the door open. State courts interpreting comparable statutes have ruled that similar situations constituted sufficient compliance with such statutes. *Collins* v. *State,* 184 Tenn. 356, 199 S.W. 2d 96; *Thigpen* v. *State,* 51 Okla. Cr. 28, 299 Pac. 230; cf. *Hiller* v. *State,* 190 Wisc. 369.

2. On the basis of the decision below, the majority were clearly correct in holding that, as to these peti-

tioners, the admission of the evidence seized at the 10th Street premises could not have prejudiced them. The largest volume of evidence establishing the operation of a lottery was seized at the O Street premises. Petitioners, other than Glover, Holsey, and Bell, were all arrested there. The three not so arrested were connected with those premises by the observations of the officers and by some of the evidence seized there bearing the symbols "K", "54", "B" or "B-40". Glover, Bell, and Holsey were all implicated by the evidence found at their homes, Glover and Bell by their admissions, and Glover and Holsey by the fact that officers placed bets with them (see the Statement, *supra*, pp. 5, 8, fn. 4).

3. Petitioners' attack (Pet. 11-16) upon the sufficiency of the probable cause of the affidavit upon which the search warrant covering the premises located at 1628 O Street, N.W. was based is without substance. From a reading of the affidavit (Pet. App. 2-22) it is hard to conceive of a more clear-cut case of sufficient probable cause for the issuance of a search warrant than was involved here. "Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed". *Brinegar* v. *United States*, 338 U.S. 160, 175-176. The existence of probable cause does not require the officers to possess legal evidence to convict. *Id.* Here the affidavit recites in detail the police officers' observations of petitioners, and the premises for which search warrants were issued, over a 2½ month period. The inclusion in the affidavit of factual conclusions and characteriza-

tions of some of the persons surveilled such as "George Bell, a suspected numbers writer" (Pet. App. 7) and "Bernie [*sic*] King, Marcellus Winston, Wilbert Gross, and James Davis, all known numbers operators" (Pet. App. 10) is perfectly proper, particularly here where the affidavit consisted largely of actual observations. In determining the existence of probable cause, courts have consistently permitted officers to draw upon their past experience, information, and common knowledge. See *Brinegar* v. *United States,* 338 U.S. 160, 162; *Carroll* v. *United States,* 267 U.S. 132; *Washington* v. *United States,* 202 F. 2d 214 (C.A. D.C.), certiorari denied, 345 U.S. 956.

Petitioner's further argument that the search warrant was invalid because the affidavit alleged facts showing the commission of a misdemeanor rather than a felony ignores the recitation therein indicating the commission of a felony (22 D.C. Code 1501). Rule 41(b), F.R. Crim. P., authorizes, without specification as to the type of crime, the issuance of a warrant for the search and seizure of any property "[d]esigned or intended for use or which is or has been used as the means of committing a criminal offense." *Clay* v. *United States,* 239 F. 2d 196 (C.A. 5), upon which petitioners rely (Pet. 13), involves a search without a warrant where there was no evidence that defendant was committing any crime—misdemeanor or felony—when he was searched.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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